

SENATE BILL NO. 666

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on \_\_\_\_\_)

(Patron Prior to Substitute--Senator Petersen)

A BILL to amend and reenact §§ 25.1-100 and 25.1-230.1 of the Code of Virginia, relating to eminent domain; lost profits.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 25.1-100 and 25.1-230.1 of the Code of Virginia are amended and reenacted as follows:**

**§ 25.1-100. Definitions.**

As used in this title, unless the context requires a different meaning:

"Appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

"Body determining just compensation" means a panel of commissioners empaneled pursuant to § 25.1-227.2, jury selected pursuant to § 25.1-229, or the court if neither a panel of commissioners nor a jury is appointed or empaneled.

"Court" means the court having jurisdiction as provided in § 25.1-201.

"Date of valuation" means the time of the lawful taking by the petitioner, or the date of the filing of the petition pursuant to § 25.1-205, whichever occurs first.

"Freeholder" means any person owning an interest in land in fee, including a person owning a condominium unit.

"Land" means real estate and all rights and appurtenances thereto, together with the structures and other improvements thereon, and any right, title, interest, estate or claim in or to real estate.

"Locality" or "local government" means a county, city, or town, as the context may require.

26 "Lost access" means a material impairment of direct access to property, a portion of which has  
27 been taken or damaged as set out in subsection B of § 25.1-230.1. This definition of the term "lost access"  
28 shall not diminish any existing right or remedy, and shall not create any new right or remedy other than  
29 to allow the body determining just compensation to consider a change in access in awarding just  
30 compensation.

31 "Lost profits" means a loss of ~~business profits, as defined in § 25.1-230.1, that is suffered or~~  
32 expected profits suffered by a business or farm operation as a result of a taking or damaging of the property  
33 on which ~~a~~ the business or farm operation is located, ~~subject to adjustment using generally accepted~~  
34 accounting principles consistently applied, from a business or farm operation operated for a period not to  
35 exceed three years from the later of (i) the date of valuation or (ii) the date the state agency or its contractor  
36 prevents the owner from using the land or any of the owner's other property rights are taken. ~~The person~~  
37 business or farm operation claiming lost profits is entitled to compensation whether part of the property  
38 or the entire parcel of property is taken. ~~In order to qualify for an award of lost profits, one of the following~~  
39 ~~conditions shall be met: (a) the business is owned by the owner of the property taken, or by a tenant whose~~  
40 ~~leasehold interest grants the tenant exclusive possession of substantially all the property taken, or (b) the~~  
41 ~~farm operation is operated by the owner of the property taken, or by a tenant using for a farm operation~~  
42 ~~the property taken, to the extent that the loss is determined and proven pursuant to or damaged, and bears~~  
43 the burden of proving lost profits in accordance with the requirements of subsection C of § 25.1-230.1.  
44 ~~This definition of the term "lost profits" shall not create any new right or remedy or diminish any existing~~  
45 ~~right or remedy other than to allow the body determining just compensation to consider lost profits in~~  
46 ~~awarding just compensation if a person asserts a right to lost profits in a claim for compensation.~~

47 "Owner" means any person who owns property, provided that the person's ownership of the  
48 property is of record in the land records of the clerk's office of the circuit court of the county or city where  
49 the property is located. The term "owner" shall not include trustees or beneficiaries under a deed of trust,  
50 any person with a security interest in the property, or any person with a judgment or lien against the  
51 property. This definition of the term "owner" shall not affect in any way the valuation of property.

52 "Person" means any individual; firm; cooperative; association; corporation; limited liability  
53 company; trust; business trust; syndicate; partnership; limited liability partnership; joint venture; receiver;  
54 trustee in bankruptcy or any other person acting in a fiduciary or representative capacity, whether  
55 appointed by a court or otherwise; club, society or other group or combination acting as a unit; the  
56 Commonwealth or any department, agency or instrumentality thereof; any city, county, town, or other  
57 political subdivision or any department, agency or instrumentality thereof; or any interstate body to which  
58 the Commonwealth is a party.

59 "Petitioner" or "condemnor" means any person who possesses the power to exercise the right of  
60 eminent domain and who seeks to exercise such power. The term "petitioner" or "condemnor" includes a  
61 state agency.

62 "Property" means land and personal property, and any right, title, interest, estate or claim in or to  
63 such property.

64 "State agency" means any (i) department, agency or instrumentality of the Commonwealth; (ii)  
65 public authority, municipal corporation, local governmental unit or political subdivision of the  
66 Commonwealth or any department, agency or instrumentality thereof; (iii) person who has the authority  
67 to acquire property by eminent domain under state law; or (iv) two or more of the aforementioned that  
68 carry out projects that cause persons to be displaced.

69 "State institution" means any (i) institution enumerated in § 23.1-1100 or (ii) state hospital or state  
70 training center operated by the Department of Behavioral Health and Developmental Services.

71 **§ 25.1-230.1. Lost access and lost profits.**

72 A. For purposes of this section:

73 "Business" shall have the same meaning as set forth in § 25.1-400.

74 ~~"Business profit" means the average net income for federal income tax purposes for the three years~~  
75 ~~immediately prior to the later of (i) the date of valuation or (ii) the date the state agency or its contractor~~  
76 ~~prevents the owner from using the land or any of the owner's other property rights are taken, for a business~~  
77 ~~or farm operation located on the property taken.~~

78 "Direct access" means ingress or egress on or off a public road, street, or highway at a location  
79 where the property adjoins that road, street, or highway.

80 "Farm operation" shall have the same meaning as set forth in § 25.1-400.

81 B. The body determining just compensation shall include in its determination of damage to the  
82 residue any loss in market value of the remaining property from lost access caused by the taking or  
83 damaging of the property. The body determining just compensation shall ascertain any reduction in value  
84 for lost access, if any, that may accrue to the residue as provided in subsection A of § 25.1-230, by reason  
85 of the taking and use by the petitioner. If such peculiar benefit or enhancement in value shall exceed the  
86 reduction in value, there shall be no recovery against the landowner for such excess. The body determining  
87 just compensation may not consider an injury or benefit that the property owner experiences in common  
88 with the general community, including off-site circuitry of travel and diversion of traffic, arising from an  
89 exercise of the police power. The body determining just compensation shall ensure that any compensation  
90 awarded for lost access shall not be duplicated in the compensation otherwise awarded to the owner of the  
91 property taken or damaged.

92 C. The body determining just compensation shall include in its determination of just compensation  
93 lost profits to the owner of a business or farm operation conducted on the property taken ~~only~~ or damaged  
94 if the owner or the business or farm operation proves with reasonable certainty the amount of the loss and  
95 that the loss is directly and proximately caused by the taking or damaging of the property through the  
96 exercise of eminent domain and the following conditions are met:

97 1. The loss cannot be reasonably prevented by a relocation of the business or farm operation, or  
98 by taking steps and adopting procedures that a reasonably prudent person would take and adopt;

99 2. The loss will not be included in relocation assistance provided pursuant to Chapter 4 (§ 25.1-  
100 400 et seq.);

101 3. Compensation for the loss will not be duplicated in the compensation otherwise awarded to the  
102 owner of the property taken or damaged; and

103 4. The loss shall be determined in accordance with generally accepted accounting principles  
104 applied on a consistent basis.

105 D. Any and all liability for lost access shall be established and made a part of the award of just  
106 compensation for damage to the residue of the property taken or damaged, and any and all liability for lost  
107 profits shall be set forth specifically in the award. In a partial acquisition, in the event that the owner of  
108 the property being condemned and the owner of the business or farm operation claiming lost profits are  
109 the same, then any enhancement or peculiar benefit shall be offset against both damage to the residue and  
110 lost profits.

111 E. It shall not be a requirement of any bona fide effort to purchase the property pursuant to § 25.1-  
112 204 or 33.2-1001 that the petitioner include any liability for lost profits in a written offer to purchase the  
113 property.

114 F. In any proceeding in which the owner of a business or farm operation seeks to recover lost  
115 profits, the owner shall provide the condemning authority with all federal income tax returns, if any,  
116 relating to the business or farm operation for which the owner seeks lost profits for a period of three years  
117 prior to the later of (i) the valuation date or (ii) the date the state agency or its contractor prevents the  
118 owner from using the land or any of the owner's other property rights are taken, and for each year thereafter  
119 during the pendency of the condemnation proceeding. The condemning authority shall not divulge the  
120 information provided pursuant to this subsection except in connection with the condemnation proceeding.  
121 Additionally, unless already named in the petition for condemnation, the owner of the business or farm  
122 operation may intervene in the proceeding by filing a motion to intervene accompanied by a petition for  
123 intervention setting forth the basis for the lost profits claim under this chapter. Proceedings to adjudicate  
124 lost profits may, upon motion of the owner of the business or farm operation, be bifurcated from the other  
125 proceedings to determine just compensation ~~if the lost profits claim period will not expire until one year~~  
126 ~~or later from the date of the filing of the petition for condemnation~~, but such bifurcation shall not prevent  
127 the entry of an order confirming indefeasible title to the land interests acquired by the condemning  
128 authority.

129 G. Nothing in this section is intended to provide for compensation for inverse condemnation claims  
130 for temporary interference with or interruption of a business or farm operation ~~other than that which is~~  
131 ~~directly and proximately caused by a taking or damaging of property through the exercise of eminent~~

**132** ~~domain~~ where no property of the owner is taken and where the impact to the property is for a period of  
**133** fewer than seven days.

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